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No. _____

In The

Supreme Court of the United States

October Term, 1995

MITCHELL J. BROWN AND
HOWARD E. RUDOLPH,

Petitioners,

vs.

JOSEPH PASKVAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

SHARON SOBOL JORDAN
Director of Law

ROBERT JOSEPH LALLY
Counsel of Record

City of Cleveland
Room 106 – City Hall
601 Lakeside Avenue
Cleveland, Ohio 44114
(216) 664-2800

Attorneys for Petitioners
Mitchell J. Brown and
Howard E. Rudolph

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

May a finding of race-based denial of equal protection in the workplace be premised upon the race of persons other than the employee and his co-workers; specifically, has a white police officer who was not granted a discretionary promotion and who has had restrictions placed on his duties and job-related privileges suffered a denial of his equal protection rights if his municipal employer's actions were based, in part, upon public dissatisfaction with the officer's performance as voiced by an integrated but predominately minority portion of the public?

LIST OF PARTIES

The parties in this action are Plaintiff-Respondent Joseph Paskvan, and Defendants-Petitioners Mitchell J. Brown, individually and in his official capacity as Director of Public Safety of the City of Cleveland, and Howard E. Rudolph, individually and in his official capacity as Chief of Police of the City of Cleveland.

George Voinovich, former Mayor of the City of Cleveland and an original party Defendant, was granted judgment by way of directed verdict at the District Court level. The City of Cleveland Civil Service Commission, also an original party Defendant, was granted Judgment by the Sixth Circuit Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

Mitchell J. Brown and Howard E. Rudolph, Petitioners, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit filed on November 21, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reproduced in the Appendix at A-1.

The memorandum opinion and order of the United States District Court for the Northern District of Ohio is reproduced in the Appendix at A-17.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was filed on November 21, 1995. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1), which provides for review of the judgment rendered by the United States Court of Appeals for the Sixth Circuit in this case by grant of a petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983 are involved. The

pertinent text is set forth in the Appendix at A-27 and A-28, respectively.

STATEMENT OF THE CASE

Respondent Joseph Paskvan has been a City of Cleveland Police Officer since 1973. During the nine year period between 1976 and 1985, Paskvan, a white officer, was involved in nine shootings in the line of duty, all involving minority suspects. Paskvan was found to be legally justified in each of the nine shootings, and was not criminally charged.

At trial, Paskvan described the newspaper, television and radio publicity surrounding the last two shootings he was involved in as a "circus". These shootings, which took place in 1982 and 1985, were both fatal and both involved minority suspects. Paskvan claims that the alleged discriminatory conduct of his superiors was attributable to the outcry of community organizations, who criticized Paskvan's conduct in these final two shootings as racist acts. However, Paskvan's own witnesses described the community organizations as "integrated" organizations.

Paskvan claims that the alleged discriminatory conduct of the Petitioners is evidenced by his extended assignment to the police gymnasium after the final shooting, denial of eligibility for uniformed secondary employment for approximately two years after the final shooting, and denial of a discretionary promotion to the rank of sergeant. Paskvan took and passed a promotional exam for the position of sergeant in June, 1987. Paskvan was

certified as eligible for a discretionary promotion to the rank of sergeant but was not promoted.

Under the City of Cleveland Charter, the Safety Director has discretion under a "rule of three" to promote one from among the highest ranked three on an eligible list, and an eligible person may be considered four times. Petitioner Howard Rudolph was the Chief of Police who recommended against the promotion of Paskvan, and Petitioner Mitchell Brown was the Safety Director who decided not to promote Paskvan based upon Rudolph's recommendation. Rudolph testified that his recommendation was based on several factors, including the community outcry over Paskvan's shootings. Similarly, Brown expressed concern about the number of shootings and the controversy which resulted. The five officers promoted by Brown instead of Paskvan under the "rule of three" were all white officers.

Paskvan called a number of police officers at trial who testified that they had been involved in shootings and promoted. Only one, Robert Tolliver, was a minority officer. Tolliver testified that he was involved in two shootings with minorities, one of them fatal. Tolliver was later promoted to sergeant.

Paskvan also called Lieutenant Gary Gingell, a white officer, who testified that he was involved in a shooting with a white male and was later promoted to sergeant. Paskvan also called former Police Chief Edward Kovacic, a white officer, who testified that he was involved in six shootings, all involving minorities, and was promoted, eventually, to the rank of Chief. Paskvan also called Officer James Simone, a white officer, who testified that he

was involved in ten shootings, including three fatal shootings. One shooting involved a minority suspect, and the remainder involved white suspects. However, Simone never sought promotion to sergeant.

Brown did not know Paskvan personally. However, Rudolph had been the lieutenant in charge of the homicide unit responsible for investigating Paskvan's final two shootings. Rudolph testified that he thought Paskvan used poor judgment in the final two shootings, and that Paskvan's behavior after the shootings created a perception and belief in the community that Paskvan was a callous individual. Thus, Rudolph determined that he would not promote Paskvan. Rudolph reconciled his finding that the final two shootings were justifiable with his decision not to promote Paskvan by citing the difference between poor judgment and criminal conduct.

When Rudolph became Police Chief in 1986, Paskvan was already restricted to the police gymnasium by prior Chief Hanton. Rudolph continued that assignment because he did not want Paskvan to become involved in another shooting incident. Likewise, Rudolph determined that Paskvan should not be permitted to engaged in secondary employment because of the potential for Paskvan to become involved in another shooting incident, as officers in secondary employment typically work in a law enforcement capacity, in uniform, and carry a gun.

This action was initiated by the filing of a Complaint on November 22, 1989. The Complaint set forth claims under 42 U.S.C. §1983 for denial of procedural and substantive due process and for intentional race discrimination depriving Paskvan of his right to equal protection

under the Fourteenth Amendment. Pendent state claims were also alleged.

On May 31, 1990, the Petitioners filed a motion to dismiss Paskvan's due process claims. The District Court granted the motion on July 3, 1990. Paskvan in turn dismissed his equal protection claim and pendent state claims without prejudice on July 16, 1990, and appealed the dismissal of his due process claims to the Sixth Circuit Court of Appeals. The Sixth Circuit Court affirmed the dismissal of Paskvan's substantive due process claim, but remanded Paskvan's procedural due process claim in an order issued on October 18, 1991. The reasons for the reversal and remand on the procedural due process claim was a possible waiver by the Petitioners of their discretion, under the City of Cleveland Charter, not to promote persons eligible for promotion despite their rank on an eligible list.

On April 27, 1993, trial commenced on Paskvan's due process claim. On April 28, 1993, Paskvan moved to amend his Complaint, during trial, to restore his equal protection claim, and the District Court granted the motion. The 1993 trial ended on May 4, 1993, with a defense verdict on Paskvan's procedural due process claim. Former Mayor George Voinovich was also granted a directed verdict at the 1993 trial. The jury, however, was unable to reach a verdict on Paskvan's equal protection claim, and a mistrial was declared with regard to that claim. It has been the law of the case since the 1993 trial that Petitioners have discretion, under the City of Cleveland Charter, not to promote police officers regardless of their ranking on an eligible list.

On March 7, 1994, retrial commenced on Paskvan's equal protection claim. On March 10, 1994, the jury returned a verdict for Paskvan. On March 24, 1994, Petitioners filed a motion for judgment. This motion was denied on May 14, 1994, making judgment final. A copy of the memorandum of District Court's opinion appears in the within Appendix at page A-17. Petitioners filed their notice of appeal on May 31, 1994. The Sixth Circuit Court of Appeals affirmed the judgment of the District Court as to Petitioners Brown and Rudolph and reversed judgment as to the Cleveland Civil Service Commission. A copy of the Sixth Circuit Court's opinion appears in the within Appendix at page A-1.

ARGUMENT

A Writ of Certiorari Should Be Granted Because The Failure To Grant A Discretionary Promotion To A Police Officer And The Placement Of Restrictions On The Officer's Duties And Privileges Based, In Part, Upon Public Dissatisfaction With The Officer's Performance Do Not Constitute A Denial Of Equal Protection As A Matter Of Law.

At issue in this case is Paskvan's claim that the City of Cleveland violated his constitutional right to equal protection by treating him differently than similarly situated minority patrol officers of the City of Cleveland. Paskvan has not alleged that the Petitioners' actions had a disparate impact on white patrol officers of the City of Cleveland as a class.

A case of disparate treatment may be submitted to a jury if the plaintiff presents direct evidence of discrimination. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F. 3d 1078 (6th Cir. 1994), *see also, Trans World Airlines, Inc., v. Thurston*, 469 U.S. 111 (1985). Without direct evidence of discrimination, the disparate treatment plaintiff must establish a *prima facie* case in accordance with the *McDonnell Douglas* paradigm, which requires:

> (1) that he is a member of a protected class; (2) that he applied for and was qualified for an open supervisor position, (3) that despite his qualifications, he was denied the promotion; and (4) that another employee with less qualifications who was not a member of the protected class was selected for the supervisor position.

Manzer, 29 F. 3d at 1081; *see also Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). The essential inquiry is whether the plaintiff has been treated differently than similarly situated individuals. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985).

In the instant case, Paskvan failed to show direct evidence of race discrimination. The Petitioners' consideration of public dissatisfaction with Paskvan, as voiced by an integrated but predominately minority portion of the population, is not direct evidence of race discrimination. On the contrary, consideration by an executive official of the views of the citizenry when exercising discretion in the promotion of a police official is good public policy, not race discrimination. The cooperation and confidence of the citizenry is critical to effective law enforcement. Unless this Court grants a writ of certiorari,

the lesson of the decision below will be that the race of the complaining *citizen* dictates whether a public official has engaged in good government or employment discrimination.

Further, Paskvan failed to establish a *prima facie* case of intentional race discrimination. Indeed, there was no evidence presented at trial of any similarly situated minority officer who was treated differently than Paskvan. Although the trial court in this case evaluated the facts within the *McDonnell Douglas* paradigm, the Sixth Circuit Court determined that Paskvan was not required to establish a case within the *McDonnell Douglas* paradigm. Moreover, the Sixth Circuit sustained Paskvan's claim for intentional race discrimination without analyzing whether Paskvan was treated differently then similarly situated minority officers. Further, the Sixth Circuit sustained Paskvan's claim based on circumstantial evidence in a faulty disparate impact analysis not applicable to an individual's claim for disparate treatment.

The decisions below are in direct conflict with the governing principles of prior decisions of this Court with respect to a claim for disparate treatment and involve an important question of first impression concerning Constitutional law: Whether claimed discrimination involving the failure to grant a discretionary promotion and restriction of a police officer's duties and job-related privileges based, in part, upon dissatisfaction with the officer's performance as voiced by an integrated but predominately minority portion of the public constitutes a denial of equal protection.

A. The Petitioners' Conduct In Response To A Public Outcry Does Not Constitute Direct Evidence Of Intentional Race Discrimination.

Paskvan has relied on *Ciechon v. City of Chicago*, 686 F. 2d 511 (7th Cir. 1982), for his argument that since a public outcry and media attention played a role in Petitioners' decision not to promote him, there is direct evidence of discriminatory intent. However, in *Ciechon*, the Seventh Circuit Court held that the plaintiff's right to due process, not equal protection, was violated by the City's reaction to the threat of adverse publicity. 686 F. 2d 517, 521.

In *Ciechon*, the Seventh Circuit actually concluded that:

> [I]n response to pressure from the Ciechon family and fearful of publicity, the City misused its disciplinary procedures to effect Ciechon's removal on charges unsupported by the evidence. By so misusing its own procedures and by permitting itself to be so manipulated by the family, the City deprived Ciechon of *due process of law.* (Citation Omitted.) (Emphasis added.)
>
> 686 F. 2d at 521.

The theory which Paskvan has advanced through the recent trial and appeal is one of denial of due process, an issue on which Petitioners had prevailed at the first trial. To prevail on his equal protection claim, it was incumbent upon Paskvan to prove intentional discrimination by Petitioners on the basis of Paskvan's race, and Paskvan has failed to prove such discrimination.

Paskvan's mistaken theory of equal protection is also reflected in the District Court's Memorandum Opinion

denying Petitioners' post-trial motion for judgment. Therein, the District Court stated:

> Brown and Rudolph also testified that their decision not to promote Paskvan was based, in part, on the publicity surrounding the shootings and the public demonstrations by minority and civil liberty organizations. However, the equal protection clause does not permit a municipality to deny a police officer a deserved promotion only because of public outcry. See, *Ciechon v. City of Chicago*, 686 F. 2d 511, 523 n. 16 (7th Cir. 1982).
>
> (District Court Memorandum Opinion and Order, A-22).

This statement reflects the District Court's confusion regarding the difference between a due process claim and an equal protection claim. This statement also demonstrates the District Court's lack of focus on intentional race discrimination in sustaining Paskvan's claim for denial of equal protection.

The Sixth Circuit Court of Appeals likewise concluded:

> We think the jury could reasonably infer from the evidence that, because he is white, Paskvan was offered as the sacrificial lamb to appease the protesting minority organizations. After the Luciano shooting in April 1985, groups representing minority interests accused Paskvan of being a murderer. It is reasonable to infer that the "heat" generated by these organizations led Rudolph to continue Paskvan's gym assignment until the arbitrator ordered Paskvan's return to the Auto Theft Unit in October 1986. Although Rudolph had cleared Paskvan in the shootings,

> he nevertheless restricted Paskvan to off-street duty. Even through September 1988, the flame from the protests still burned in Rudolph and Brown's memories; they admitted that the organizations' outcry was an important factor in denying the promotion. The jury could reasonably infer that Rudolph and Brown refused to promote Paskvan, in part, because he is white.
>
> (Sixth Circuit Opinion, A-11).

The Sixth Circuit thus made a narrative leap from equating Petitioners' decision not to promote Paskvan because of a public outcry to determining that Petitioners refused to promote Paskvan because he is white. There is no precedent of this court, or of the Sixth Circuit Court of Appeals, which would support such reasoning.

The offense alleged in a disparate treatment claim focuses extensively on the intent of the employer. *Teamsters v. United States,* 431 U.S. 324, 335, n. 15 (1977). In a disparate treatment claim, proof of discriminatory motive is critical. Unless Paskvan has proven that the Petitioners intended to discriminate against him because of his membership in a particular class, i.e., because he is white, Paskvan has not proven his disparate treatment claim. *Id.* at 336. In the instant case, there was no evidence of an intent by the Petitioners to discriminate against Paskvan on the basis of Paskvan's race.

Paskvan claimed discrimination by the Petitioners including extended assignment to the police gymnasium after the 1985 shooting, denial of eligibility for uniformed secondary employment after the 1985 shooting, and denial of a discretionary promotion to sergeant. Paskvan claimed this discrimination took place because he was a

white police officer involved in shootings with minorities, and that he has not been promoted because of "racial politics."

Paskvan's alleged direct evidence of discrimination consists of the testimony of Petitioners Mitchell Brown and Howard Rudolph. Safety Director Mitchell Brown testified that he was reluctant to promote Paskvan because of the number of shootings Paskvan was involved in and the controversy the shootings caused. Brown acknowledged that the amount of controversy Paskvan was involved in was an important factor in the decision not to promote Paskvan. Brown also discussed with Chief Howard Rudolph the restriction of Paskvan's duties because of the amount of controversy over the fatal shootings of 1982 and 1985.

Police Chief Howard Rudolph testified that he recommended to Brown that Paskvan not be promoted to sergeant, and that one of the reasons Rudolph made this recommendation was because of the outcry of the community. Rudolph acknowledged that most of the outcry was from minority organizations.

Since the above cited testimony represents the extent of Paskvan's allegedly direct evidence of discrimination, it is respectfully submitted that Paskvan's disparate treatment claim has no merit as a matter of law. The above described evidence is not direct evidence that the Petitioners intended to discriminate against Paskvan because he is white.

B. Paskvan's Failure To State A Prima Facie Case Of Intentional Race Discrimination Included The Failure To Show That Similarly Situated Minority Officers Were Treated Differently.

In the context of public employment, the equal protection clause of the Fourteenth Amendment prohibits invidious discrimination on the basis of the race of the employee. *Gutzwiller v. Fenik*, 860 F. 2d 1317, 1328 (6th Cir. 1988). The equal protection clause requires the government to treat similarly situated individuals in a similar manner. *Id.* In the instant case, Paskvan, in the absence of direct evidence of discrimination, was required to prove that similarly situated minority officers were promoted, and Paskvan failed to do so.

As reflected in the statement of the case, Paskvan never even suggested that any of the minority officers who were on his eligible list were similarly situated to Paskvan. In fact, Paskvan failed to identify any minority officer from his eligible list at trial.

The only minority officer called by Paskvan was Sergeant Robert Tolliver, a black officer, who testified that he had been involved in two shootings, including one fatality. Tolliver was promoted to sergeant in 1982, after the two shootings. However, Mitchell Brown was not the safety director and Howard Rudolph was not the police chief at the time of Tolliver's promotion to sergeant. Due to the remoteness in time of Tolliver's promotion compared to the time when Paskvan became eligible for promotion, and the difference in police chief and safety director when Tolliver was promoted, it is respectfully

submitted that Tolliver was not similarly situated to Paskvan.

The Sixth Circuit, in *Mitchell v. Toledo Hospital*, 964 F. 2d 577 (6th Cir. 1992), explained the plaintiff's burden of showing that similarly situated individuals outside of the plaintiff's class have been treated differently:

> As the Sixth Circuit has frequently phrased the requirements of a *prima facie* claim of disparate treatment using such a "comparable non-protected person was treated better" element as one of the requisites, the plaintiff must produce evidence which at a minimum establishes (1) that he was a member of a protected class and (2) that for the same or similar conduct he was treated differently than similarly situated non-minority employees. (citation omitted).
>
> * * *
>
> It is fundamental that to make a comparison of a discrimination plaintiff's treatment to that of non-minority employees, the plaintiff must show that the *"comparables"* are similarly situated *in all respects. Stotts v. Memphis Fire Department*, 858 F. 2d 289 (6th Cir. 1988). Thus, to be deemed "similarly situated" the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it. (citation omitted).

964 F. 2d at 583.

Paskvan claims that Tolliver is similarly situated even though Tolliver was involved in only two shootings because Chief Rudolph would have promoted Paskvan up until the time of Paskvan's last shooting. Paskvan, however, was unable to produce a similarly situated officer because he failed to produce a minority officer seeking promotion to sergeant contemporaneously with Paskvan who had been involved in nearly as many shootings as Paskvan had been involved in. Since Paskvan was unable to produce any minority officer who was similarly situated to Paskvan, he was unable to show that any minority person similarly situated was treated differently than him, and his claim for denial of equal protection must therefore fail.

As reflected in the statement of the case, part of Paskvan's case consisted of the testimony of allegedly comparable white officers who were involved in shootings and promoted. However, none of the white officers called by Paskvan provided meaningful testimony that Paskvan was treated differently than a similarly situated minority officer. Furthermore, the testimony of Edward Kovacic, Paskvan's own witness, established that white officers who had been involved in shootings with minorities were in fact not denied promotion for that reason. Chief Edward Kovacic testified that he was involved in six shootings, all with minorities, and was nevertheless promoted to the rank of police chief.

It is respectfully submitted that Paskvan's lack of proof of intentional race discrimination is most evident in his complete failure to prove that similarly situated minority candidates for sergeant were treated differently than Paskvan. Moreover, the importance of the similarly

situated requirement is underscored in *Ciechon v. City of Chicago*, 686 F. 2d 511 (7th Cir. 1982), a case which has been extensively cited by Paskvan and also by the District Court in its Memorandum Opinion denying Petitioners' post-trial motion for judgment.

As the Seventh Circuit Court stated in *Ciechon*:

> The disciplinary proceedings against Ciechon also constituted a denial of equal protection of the law because they represented an arbitrary, irrational decision to discriminate among the two paramedics, Ciechon and Ritt, who were equally responsible for the welfare of the patient on all ambulance runs. Thus two persons similarly situated, in that they experienced the same set of circumstances and were equally responsible for patient assessment and treatment, were treated absolutely differently.

686 F. 2d at 522.

Of the officers called by Paskvan, Chief Kovacic is most similarly situated. However, although Chief Kovacic was called as Paskvan's witness, his record actually disproves Paskvan's theory because he was involved in multiple shootings with minorities and nevertheless was promoted to police chief.

Paskvan failed to produce an officer with the City of Cleveland, minority or otherwise, who is similarly situated to Paskvan. None of Paskvan's alleged "comparables" were on Paskvan's eligible list, none reported to the same supervisor, and none engaged in the number of shootings Paskvan did prior to seeking promotion to the rank of sergeant.

Paskvan's claim should be judged by utilizing the analytical framework which was developed primarily in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and modified for promotion contexts in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Under *McDonnell Douglas* and *Burdine*, a plaintiff must produce sufficient evidence to establish a *prima facie* case of discrimination. The burden of production then shifts to the employer to articulate a legitimate non-discriminatory reason for rejecting the plaintiff. The ultimate burden of persuasion remains at all times with the plaintiff, however, who in this instance had to prove that he was discriminated against on the basis of his race. *Galbraith v. Northern Telecom*, 944 F. 2d 275 (6th Cir. 1991); *cert. denied*, 503 U.S. 945 (1992).

To establish a *prima facie* case with respect to a denial of promotion claim, a plaintiff must show: (1) that he is a member of a protected class; (2) that he applied for and was qualified for an open supervisor position; (3) that despite his qualifications, he was denied the promotion; and (4) that another employee with less qualifications who was not a member of the protected class was selected for the supervisor position. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

Paskvan has failed to establish that a minority employee with lesser qualification was selected in his place. Most importantly, the five officers considered along with Paskvan according to the "rule of three" were all white officers. Simply put, a minority officer was not selected for promotion "in Paskvan's place."

C. Conclusion

The Sixth Circuit determined that Paskvan's claim need not be evaluated using the *McDonnell Douglas* and *Burdine* analytical framework. That is, Paskvan was relieved from establishing that similarly situated minority candidates were treated differently or that a less qualified minority candidate was promoted in Paskvan's place. Further, the Sixth Circuit determined that the Petitioners' consideration of the complaints of minority citizenry constituted direct evidence of intentional race discrimination. In so doing, the Sixth Circuit improperly considered the race of persons other than an employee and his co-workers in sustaining a claim for intentional race discrimination in the workplace.

The decisions below are in direct conflict with the governing principles of prior decisions of this Court and involve an important question of first impression concerning Constitutional law. It is respectfully submitted that this petition for a writ of certiorari should be granted to settle this question.

Respectfully submitted,

SHARON SOBOL JORDAN
Director of Law

ROBERT JOSEPH LALLY
Assistant Director of Law

Room 106 – City Hall
601 Lakeside Avenue
Cleveland, Ohio 44114
(216) 664-2685

Attorneys for Petitioners

Not Recommended For Full Text Publication

No. 94-3593

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH PASKVAN,

Plaintiff-Appellee,

v.

CITY OF CLEVELAND CIVIL SERVICE COMMISSION; MITCHELL BROWN, individually and officially as City of Cleveland Director of Public Safety; and HOWARD RUDOLPH, individually and officially as City of Cleveland Chief of Police,

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Ohio.

(Filed Nov. 21, 1995)

BEFORE: CONTIE, RYAN, and SUHRHEINRICH, Circuit Judges.

RYAN, Circuit Judge. In this 42 U.S.C. § 1983 action, the jury returned a verdict for the plaintiff, Joseph Paskvan, finding that the defendants violated his Fourteenth Amendment right to equal protection by denying him a promotion on the basis of his race. The defendants, the Cleveland Civil Service Commission, Mitchell Brown in his individual and official capacities, and Howard Rudolph in his individual and official capacities, appeal from the district court's denial of their motions for judgment as a matter of law and, in the alternative, for a new

trial. On appeal, the defendants argue that insufficient evidence supported the verdict, that the district court erroneously admitted certain evidence proffered by the plaintiff, and that the district court erroneously instructed the jury.

We affirm the judgment as to Rudolph and Brown in their individual and official capacities, but reverse the judgment as to the Civil Service Commission.

I.

Joseph Paskvan has served as a Cleveland, Ohio police officer since 1973. From around 1976 to 1985, Paskvan, while in the line of duty, was involved in nine shootings of minority persons. The police department found Paskvan justified in each shooting and criminal charges were never brought against him. The last two shootings are particularly relevant to this litigation.

On July 23, 1982, Paskvan shot and killed Michael Woods. Paskvan testified that the shooting occurred while he was driving to a police union meeting. Woods was in a vehicle that was traveling in the lane next to Paskvan's vehicle. Woods pointed a gun at Paskvan who picked up a 9-mm. handgun and shot Woods. Howard Rudolph, then the lieutenant in charge of the homicide unit (but later destined to become chief of police), investigated the shooting. Rudolph found that Paskvan committed no crime. At trial, however, Rudolph testified that the plaintiff exercised poor judgment. According to Rudolph's investigation, Woods's vehicle was traveling so fast at the time of the shooting that Paskvan could

have avoided Woods by simply slowing down and driving away. However, Rudolph conceded at trial that, at the end of the investigation in 1982, he found that Paskvan had not violated any department regulation.[1]

On April 10, 1985, Paskvan shot and killed Marcos Luciano. That day, Paskvan and his partner discovered a stolen vehicle on a city street. The officers called for a patrol car. As the patrol car approached, so did Luciano, who was armed. Paskvan ordered Luciano to drop his gun, but when Luciano pointed the gun at one of the patrol officers, Paskvan fired. As it turned out, Luciano was actually carrying a BB gun. Again, then-Lieutenant Rudolph investigated the shooting and concluded that the plaintiff neither committed a crime nor violated a regulation. At trial, however, Rudolph criticized Paskvan's judgment, declaring that "he shot him, I believe, a little prematurely."

After the Luciano shooting, department procedure called for Paskvan to be assigned to the police gym for ninety days in order to "relieve stress." However, after ninety days had passed, Paskvan was still assigned to the gym, where he remained for nineteen months. The plaintiff attributes his extended assignment to the gym to several events. First, on April 11, 1985, Cleveland City Councilman John Barnes, the Chairman of the Council's Public Safety Committee, sent a letter to then-Chief of Police William Hanton requesting the plaintiff's removal

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[1] Actually, Paskvan was suspended for five days for using an unauthorized weapon, the 9-mm. gun.

from street duty, claiming that many citizens were concerned with Paskvan's involvement in "eight questionable shootings." The councilman alleged, "The last time a man was shot was because he drew a 'squeegee.' This time a man brandished a bee-bee gun. . . . Paskvan acquired a reputation as a[n] 'Exterminator.' "

Next, a month after the shooting several citizen groups held a march and demonstration to protest the Woods and Luciano shootings. The protesters' publicity flyer targeted Paskvan and proclaimed in part:

> DON'T MISS THIS CHANCE TO JOIN THIS GIANT DEMONSTRATION AGAINST THESE OUTRAGEOUS KILLINGS OF LUCIANO JR., AND WOODS, two minority young men that did not deserve to die the way they did at the hands of a police officer who has no respect for human life.

(Capitalization in original.) The demonstration's sponsors included three organizations Councilman Barnes identified as "primarily minority groups."

The plaintiff introduced into evidence another flyer, but it is not entirely clear when this flyer was distributed or if it was. This flyer urged voters to "Vote Yes on Issue 3." The flyer showed a sketch drawing of a police officer shooting a handcuffed person in the head, warning "*You* may be next!" (Emphasis in original.) Some text in the center of the flyer appeared to quote some unnamed source, perhaps a referendum: "The murder of Michael Anthony Woods is of concern to all citizens, and has many ramifications, racially and politically. Police actions in this case have proven divisive in this city, and police attitudes have been high-handed and again, divisive."

Some of the same groups that issued the May 1985 flyer issued the "Issue 3" flyer.

In April 1986, Rudolph became chief of police, and he decided to continue Paskvan's assignment to the gym. Rudolph also denied Paskvan's request for "secondary employment," that is, private security-type work performed by officers to supplement their income. Paskvan sought the help of the police union in order to obtain release from the gym assignment and in gaining secondary employment permission. The collective bargaining agreement between the City of Cleveland and the police union called for arbitration of such an issue, and on May 22, 1986, the arbitrator held that the police department must either state a reason for permanently assigning Paskvan to the gym, or reassign him to his former unit (the Auto Theft Unit). The arbitrator added that the "reason provided by the City cannot be arbitrary, discriminatory or unreasonable."

In early June 1986, the City claimed that Paskvan's " 'permanent assignment to the Training Academy Gymnasium allows the facility to extend its hours of operation and remain open and available . . . on a regular basis.' " Paskvan returned to the arbitrator. On September 12, 1986, the arbitrator held that the City's stated reason was "arbitrary, discriminatory or unreasonable" because the City had singled out Paskvan to monitor the gym when in fact no monitor was needed at all. Although the arbitrator mentioned the City's "discriminatory attitude towards" Paskvan, nowhere did the arbitral decision mention race. The arbitrator ordered the City to transfer Paskvan out of the gym.

A month after the arbitrator's decision, the plaintiff was transferred back to the Auto Theft Unit. But Chief Rudolph attached a condition to the transfer. In an October 3, 1986 memorandum to Paskvan's supervisors, Rudolph ordered, "Under no circumstances is [Paskvan] to be instructed to perform or be permitted to engage in any activity which would allow him to work outside the Police Headquarters Building." Despite the memorandum, Paskvan's supervisors recommended approval of his repeated requests to engage in secondary employment. Chief Rudolph disapproved each request. Paskvan took the issue to arbitration and on November 28, 1988, won again. After describing the shootings, the arbitrator characterized the City's proffered reasons for disapproving secondary employment – fear of another shooting and adverse reaction by citizen groups – as "arbitrary, discriminatory and unreasonable." Again, the arbitral decision never expressly mentioned that the City or Chief Rudolph acted with a racially discriminatory purpose.

While trying to win approval for secondary employment, Paskvan was also trying to become a sergeant. In June 1987, Paskvan took the exam for promotion to police sergeant. In November 1987, the Civil Service Commission generated a promotion list that ranked the officers according to a combination of their exam score and seniority points. Out of more than one hundred officers, Paskvan ranked third. In 1988, Mitchell Brown, the Director of Public Safety, decided that the budget allowed for sergeant promotions. Although he consulted with the chief of police, Brown wielded the sole authority to promote police officers. The Civil Service Commission certified the November 1987 eligibility list and provided it to

Brown. Under the "rule of three," Brown could fill each position with the three top-ranked individuals for that position. In September 1988, Brown promoted the eighteen top-ranked officers – except for Paskvan. Over time, the November 1987 eligibility list was used to promote 49 officers to sergeant – those ranked 1 to 50 – but not Paskvan.

Brown testified that the community controversy over the shootings was "one of the reasons" and "an important factor" for denying Paskvan the promotion. At trial, the only other reason articulated by Brown was the chief's recommendation that Paskvan "wasn't supervisory material." Chief Rudolph testified that "one of the reasons" he recommended denying the plaintiff's promotion was the "outcry by the community," including community organizations, "most" of which were "minority organizations." At trial, Rudolph asserted two other reasons: (1) Paskvan exercised "poor judgment" in the Woods and Luciano shootings; and (2) after transferring back to the Auto Theft Unit, Paskvan engaged in behavior and made comments that resulted in disciplinary charges. No testimony explained the allegedly improper behavior and comments.

Paskvan brought this action on November 22, 1989. After this court affirmed dismissal of the plaintiff's substantive due process claims, the parties tried the procedural due process and equal protection claims in April 1993. The first jury found for the defendants on the procedural due process claim, but could not agree on a verdict for the equal protection claim. In March 1994, the parties retried the equal protection claim. This time, the

jury returned a verdict for the plaintiff and awarded damages.

II.

A.

We review a motion for judgment as a matter of law under the same standard used by the district court. *Marsh v. Arn*, 937 F.2d 1056, 1060 (6th Cir. 1991). We view the evidence in the light most favorable to the nonmoving party, and give that party the benefit of all reasonable inferences. *Id.*

B.

The Equal Protection Clause of the Fourteenth Amendment declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws." State legislation or other official action that classify groups does not generally run afoul of the right to equal protection where "the classification . . . is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985).

There are two ways, however, by which government action implicating race can violate the right to equal protection.

> Certain classifications . . . in themselves supply a reason to infer antipathy. Race is the paradigm. [1] A racial classification, *regardless of purported motivation,* is presumptively invalid and can be upheld only upon an extraordinary justification. [2] This rule applies as well to a classification that is ostensibly neutral but is an

> obvious pretext for racial discrimination. But . . . even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a *discriminatory purpose.*

Personnel Admin. of Mass. v. Feeney, 442 U.S. 256, 272 (1979) (citations omitted) (emphases and brackets added). In proving the latter form of unconstitutional discrimination, "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 265 (1977). Discriminatory purpose "implies more than intent as volition or intent as awareness of consequences." *Feeney,* 442 U.S. at 279. Rather,

> [i]t implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Id.

A plaintiff need *not* prove that the challenged action was motivated "solely" or "primar[ily]" by a racially discriminatory purpose. *Arlington Heights,* 429 U.S. at 265. Rather, once the plaintiff proves that the challenged decision was "motivated in part by a racially discriminatory purpose," the burden – presumably the burden of production – shifts to the defendant to "establish[ ] that the same decision would have resulted even had the impermissible purpose not been considered." *Id.* at 271 n.21; *Wesley v. Collins,* 791 F.2d 1255, 1262 (6th Cir. 1986). Both the plaintiff and defendant's burdens of proof must be

carried by a preponderance of the evidence. *Wesley*, 791 F.2d at 1262.

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. Evidentiary sources might include the disproportionate adverse impact on one race, the "historical background of the decision," the "specific sequence of events leading up to the challenged decision," departures from procedural or substantive norms, legislative or administrative history, and contemporary statements by decisionmakers. *Id.* at 266-68.

We conclude that a reasonable trier of fact could find that Rudolph and Brown, individually and as the city's policymakers in their official capacities, acted with discriminatory purpose in choosing not to promote Paskvan. First, the jury justifiably disbelieved Rudolph's other proffered reasons for denying the promotion. As for poor judgment, Rudolph himself cleared Paskvan of criminal wrongdoing in the shootings, and admitted at trial that Paskvan's conduct did not warrant internal disciplinary charges. As for poor leadership, we can find no testimony in which Rudolph supports this assertion with facts. Indeed, Paskvan's supervisor in the Auto Theft Unit, Sergeant George Sherwood, testified that Paskvan is in charge when Sherwood is absent and that Paskvan could perform a sergeant's duties "very well." Because the jury could reject Rudolph's claim that he relied on those reasons, we focus on whether the defendants acted with racially discriminatory purpose in reacting to the public outcry.

We think the jury could reasonably infer from the evidence that, because he is white, Paskvan was offered as the sacrificial lamb to appease the protesting minority organizations. After the Luciano shooting in April 1985, groups representing minority interests accused Paskvan of being a murderer. It is reasonable to infer that the "heat" generated by these organizations led Rudolph to continue Paskvan's gym assignment until the arbitrator ordered Paskvan's return to the Auto Theft Unit in October 1986. Although Rudolph had cleared Paskvan in the shootings, he nevertheless restricted Paskvan to off-street duty. Even through September 1988, the flame from the protests still burned in Rudolph and Brown's memories; they admitted that the organizations' outcry was an important factor in denying the promotion. The jury could reasonably infer that Rudolph and Brown refused to promote Paskvan, in part, because he is white.

It is also reasonable to find that Rudolph would have recommended promotion and Brown would have promoted the plaintiff had they not taken the plaintiff's race into consideration. From the November 1987 eligibility list, promotions were made in rank order from 1 through 50 – except Paskvan. The jury rejected poor judgment and poor leadership as credible reasons to deny the promotion; accordingly, the jury could find that Rudolph and Brown would not have made the same decision had Paskvan's race not been a motivating factor. The jury's verdict was not against the clear weight of the evidence so as to warrant a new trial.

The defendants place great importance upon the plaintiff's failure to prove the facts comprising a *prima facie* case under *McDonnell-Douglas Corp. v. Green,* 411

U.S. 792 (1973). But the *McDonnell-Douglas* framework is just that; a framework, or a "procedural device, designed only to establish an order of proof and production," *Saint Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2755 (1993); created as a means for proving discrimination where direct evidence of discriminatory intent is difficult to obtain, *see Trans-World Airlines v. Thurston*, 469 U.S. 111, 121 (1985).

> There will seldom be "eyewitness" testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern "the basic allocation of burdens and order of presentation of proof" in deciding this ultimate question.

United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) (citation omitted) (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252 (1981)) (quoted by *Hicks*, 113 S. Ct. at 2756). The evidentiary sources of the kind described in *Arlington Heights* can prove the ultimate question of discrimination *vel non;* there is no requirement that the plaintiff resort to the *McDonnell-Douglas prima facie* framework.

Finally, we note that no evidence supports a finding that the Civil Service Commission in any way discriminated against the plaintiff. As far as the record shows, the Civil Service Commission did no more than certify the November 1987 eligibility list to Brown for his use. We reverse the jury verdict as to this defendant. We affirm

the jury verdict as to Brown and Rudolph in their individual and official capacities.

III.

A.

The defendants contend that the district court should not have admitted into evidence the three arbitration decisions rendered against the City. According to the defendants, the arbitration decisions contained statements expressing factual findings and conclusions that usurped the jury's role as fact finder.

Without deciding whether the admission of the evidence was error, we conclude that any error was harmless. The plaintiff made few references to the arbitral decisions and hardly mentioned the text of the decisions. The three decisions never discussed discrimination against Paskvan based on his race. The primary evidence focused on the public outcry and the reasons for denying the promotion. The text of the decisions did not substantially sway the verdict.

B.

The defendants argue that the district court erroneously permitted the plaintiff to present the testimony of an expert witness who was unqualified and who was not identified as an expert on the witness list. Paskvan called FBI Agent Robert Connole as an expert witness to rebut Rudolph's contention that Paskvan exercised poor judgment in the shootings.

We conclude that this assignment of error is meritless. The district court did not err in holding that Connole is an expert in the area of police judgment in confrontations with armed suspects. The agent testified that he teaches defensive tactics at police academies, including instruction on how to react in confrontations with armed suspects. Also, the district court did not commit plain error by failing to grant a continuance to abate any "unfair surprise"; the defendants failed to ask for a continuance and instead tried to cross-examine Connole.

C.

The district court provided the following jury instructions on the intentional discrimination element of the claim:

> The Plaintiff alleges that the Defendants used this [promotion] provision as a pretext to discriminate against him by not promoting him. He contends that he was treated differently because he is white and that he would have been promoted if he were a minority officer who had shot two persons regardless of their race.
>
> Under the law, the equal protection clause of the 14th Amendment prohibits racially discriminatory application of a provision by the Government to a right to a promotion.
>
> This is because an employee has the constitutionally protected right to be treated equally under the law by his or her Government. The Plaintiff must establish by a preponderance of the evidence that the City applied its promotional scheme to him with racially discriminatory intent and purpose.

The defendants argue that the first paragraph suggests the existence of a similarly situated minority officer who shot two persons but was not denied a promotion. The defendants contend that the second paragraph suggests that the plaintiff had a substantive "right to a promotion."

"Jury instructions are reviewed as a whole to determine whether they adequately inform the jury of relevant considerations and provide a basis in law for the jury to reach its decision. A judgment may be reversed only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial." *Beard v. Norwegian Caribbean Lines*, 900 F.2d 71, 72-73 (6th Cir. 1990) (citation omitted).

We conclude that the jury instructions, although imperfect, were sufficiently accurate. The first paragraph simply states that the defendants violated the plaintiff's equal protection rights if they would have promoted an officer of another race; in other words, the defendants violated equal protection if they denied the plaintiff's promotion because of his race. The instruction does not direct the jury to find that there was a similarly situated officer.

It is true that, read in isolation, the second paragraph of the challenged instruction does seem to suggest that the plaintiff had a right to promotion, when in fact the director of safety could exercise discretion in promotions. However, when read in context, the instructions as a whole direct the jury to determine whether the defendants had a racially discriminatory purpose in applying the "promotional scheme." Later instructions also emphasized that "[t]he mere fact that the Plaintiff is white and

was not promoted is not sufficient in and of itself to establish his claim," and that the jury must find that the City acted with a discriminatory purpose when it "exercised its discretion." It was undisputed that Director Brown had some discretion in promoting officers, and it is unlikely that the subtle reference to a right to promotion misled the jury to believe that Paskvan was absolutely entitled to a promotion.

D.

The defendants contend that the district court failed to require the jury to find that the plaintiff had proven a *prima facie* case under *McDonnell-Douglas*. As already discussed, there exists no requirement that a plaintiff resort to the *McDonnell-Douglas* framework in order to prove discriminatory purpose.

IV.

We **AFFIRM** the judgment as to Rudolph and Brown in their individual and official capacities, but **REVERSE** the judgment as to the Civil Service Commission.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOSEPH PASKVAN,	) CASE NO. 89CV2276
Plaintiff,	)
	) Judge John M. Manos
v.	)
CITY OF CLEVELAND CIVIL SERVICE COMMISSION, et al.,	) MEMORANDUM OF OPINION
Defendant.	) (Filed May 13, 1994)

On November 22, 1989, Joseph Paskvan, plaintiff, filed the above-captioned case against the City of Cleveland Civil Service Commission, Mitchell J. Brown, Public Safety Director, Howard E. Rudolph, Chief of Police, and George V. Voinovich, Mayor of Cleveland,[1] defendants. He charged violations of his civil rights pursuant to 42 U.S.C. § 1983 (procedural and substantive due process and equal protection) and asserted pendent state claims.

On May 31, 1990, the defendants filed a motion to dismiss. The motion only addressed Paskvan's due process claims, and was granted.

Paskvan then dismissed his equal protection and pendent state claims without prejudice and filed a timely appeal. The Sixth Circuit Court of Appeals reversed in part and remanded the case.[2]

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[1] At the close of the evidence at trial, the Mayor was granted a directed verdict and is no longer a party to the case.

[2] The Sixth Circuit Court of Appeals affirmed the dismissal of Paskvan's substantive due process claim, but remanded his

On April 27, 1993, the trial commenced on Paskvan's federal claims: violation of his rights to due process and equal protection of the laws.[3] On May 4, 1993, the jury returned a verdict for the defendants on the due process count. They were unable to agree on a verdict on the equal protection count and a mistrial was declared.

On March 7, 1994, the re-trial commenced on Paskvan's equal protection claim. On March 10, 1994, the jury returned a verdict for Paskvan. The jury awarded compensatory damages in the amount of $50,000 and damages for loss of reputation and mental pain and suffering in the amount of $150,000.

On March 24, 1994, defendants filed a "Motion for Judgment as a Matter of Law or in the Alternative, New Trial or Remittitur." On April 11, 1994, the plaintiff filed a response. For the following reasons, defendants' motion is denied.

I.

Joe Paskvan, plaintiff, is a white police officer employed by the City of Cleveland since 1973.

Between 1975 and 1985, Paskvan was involved in nine shooting incidents in the line of duty. All nine of the suspects were minorities. Three of the shooting incidents were fatalities, including shootings in 1982 and 1985.

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procedural due process claim. *Paskvan v. City of Cleveland Civil Service Comm'n*, 946 F.2d 1233 (6th Cir. 1991).

[3] The court granted Paskvan's motion to reinstate his equal protection claim.

Paskvan was found to be legally justified in each of the shootings and no criminal or disciplinary charges were brought against him as a result of discharging his weapon.[4]

The 1982 and 1985 shootings drew extensive media attention. After the 1985 shooting, minority and civil liberty organizations protested at City Hall and City Councilman John Barnes presented the Mayor with a petition demanding that Paskvan be taken off the streets.

Although Paskvan was found to be legally justified in each of the shootings he was indefinitely assigned to the police gymnasium after the 1985 shooting and was denied secondary employment approval (which was routinely granted to allow officers to make supplemental income).

On June 13, 1987, Paskvan took a written promotion examination for the position of sergeant. From the results of the examination the Civil Service Commission established an eligibility list on November 23, 1987 for the position of sergeant, pursuant to the City of Cleveland Charter.

The list ranked applicants from highest to lowest according to score on the examination. Paskvan ranked third.

On September 19, 1988, the Commission certified the first twenty-four names on the eligibility list and sent it to Mitchell Brown, the City Safety Director. Under the

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[4] Paskvan was disciplined for using a weapon that was not approved by the City in the 1982 shooting.

City Charter, the City Safety Director must appoint one of every three names certified, but has discretion to select which of the three. Furthermore, if an individual is passed over three times his or her name is removed from the list.

On September 22, 1987, the top eighteen officers on the list, excluding Paskvan, were promoted in rank order, and his name was removed from the list.[5]

Paskvan then filed this action claiming that he was not promoted to sergeant because of his race in violation of the equal protection clause to the Fourteenth Amendment.

II.

The standard for judgment as a matter of law pursuant to Fed. R. Civ. P. 50 "mirrors" the standard for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986). A motion for judgment as a matter of law should be granted if, "reasonable minds could only come to a conclusion against the nonmovant." *Conklin v. Lovely*, 834 F.2d 543, 547 (6th Cir. 1987) (citations omitted).

Defendants first argue that, at trial, Paskvan produced no evidence of an intent on their part to discriminate against him. The equal protection clause prohibits a government employer (such as the City of Cleveland)

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[5] In February and September, 1989, a total of 31 others were promoted in rank order from the 1987 eligibility list. Ten of the forty-nine officers promoted from the 1987 list were minorities.

from administering its promotion procedures with racially discriminatory intent or purpose. *Charles v. Baesler*, 910 F.2d 1349, 1355 (6th Cir. 1991); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

Defendants argue that Paskvan produced no evidence that he was denied promotion because of his race, but rather only produced evidence "that he was treated differently because of the nature of the shooting incidents that he was involved in."

Paskvan produced evidence that it was highly unusual for the City not to promote using rank order on the eligibility list and that other officers, with similar service records, were promoted. Sergeant Tolliver, a black officer, testified that he was promoted in 1982, despite the fact that he had shot minority suspects in the line of duty.[6]

Safety Director Brown and Police Chief Rudolph testified that Paskvan was passed over because, based on his shootings, they had doubts about his judgment and leadership.[7] However, Paskvan produced evidence that this was a pretext. No charges were brought against him and there was testimony and documentary evidence that he

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[6] Defendants argue that Sergeant Tolliver is not similarly situation to Paskvan because neither Rudolph nor Brown were in their respective positions in 1982. However, there was no change in City policy regarding shooting incidents or promotion qualifications between 1982 and 1987.

[7] Brown testified that he had limited *personal* knowledge of Paskvan's qualifications and relied on Rudolph's recommendation.

was justified in discharging his weapon in all of his shootings.[8]

Brown and Rudolph also testified that their decision not to promote Paskvan was based, in part, on the publicity surrounding the shootings and the public demonstrations by minority and civil liberty organizations. However, the equal protection clause does not permit a municipality to deny a police officer a deserved promotion only because of public outcry. *See Ciechon v. City of Chicago,* 686 F.2d 511, 523 n.16 (7th Cir. 1982).

Defendants also argue that Paskvan did not produce evidence of a prima facie case of racial discrimination under *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817 (1973) and *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089 (1985).[9] However, Paskvan produced evidence to support a prima facie case of employment discrimination. To establish a prima facie case, a plaintiff must show that he or she (1) was a member of a protected class; (2) was subjected to adverse employment action; (3) was qualified for a particular position; and (4) either was replaced by a person not a member of the protected class or adverse employment

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[8] Furthermore, Chief Rudolph, who led the 1985 investigation, was not able to adequately explain in what way Paskvan showed poor judgment in his shooting incidents. He also was not able to adequately explain why Paskvan was not subject to discipline (and was found legally justified) even though he allegedly showed poor judgment in the shooting incidents.

[9] Title VII standards and caselaw apply in employment discrimination cases under § 1983. *See Hicks v. St. Mary's Honor Center,* 970 F.2d 487 (8th Cir. 1992).

action was not taken against a person similarly situated and not a member of the protected class. *See Barnes v. Gencorp Inc.*, 896 F.2d 1457 (6th Cir. 1990); *McDonnell Douglas*, 93 S.Ct. 1817. Paskvan was a member of the protected class (white, in the case of reverse discrimination), was not promoted, and was qualified. Furthermore, he produced evidence that similarly situated black officers were promoted.

Accordingly, defendants' motion for judgment as a matter of law is denied.

III.

Defendants charge, in the alternative to their motion for judgment as a matter of law, that they are entitled to a new trial pursuant to Fed. R. Civ. P. 59.

First, defendants charge that the verdict was against the weight of the evidence. However, Paskvan produced ample evidence of discrimination and that defendants' explanations were pretext, and the jury so found.

Second, defendants charge that they were "unfairly surprised by plaintiff's expert." As a rebuttal witness, Paskvan called FBI Agent Connole who testified that Rudolph told him, in 1985, that Paskvan's shooting was legally justified. Connole also testified about Paskvan's judgment. In order to prevail on a motion for new trial on the ground of the admission of surprise evidence, a party "must show that he was prejudiced and that failure to grant a new trial is inconsistent with substantial justice." *Erskine v. Consolidated Rail Corp.*, 814 F.2d 266, 272 (6th Cir. 1987). Connole's testimony did not address a new

theory of the case; it simply rebutted Rudolph's proffered legitimate reasons not to promote Paskvan. Therefore, defendants were neither surprised nor unfairly prejudiced by admission of Connole's testimony.

Defendants further charge that they are entitled to a new trial because three exhibits were improperly admitted into evidence. These exhibits were arbitration opinions dealing with Paskvan's restriction to the Police Gymnasium and his denial of secondary employment approval. These exhibits were probative of the defendants' intentional discrimination against Paskvan and were properly admitted after a careful balancing of the probativeness and the prejudice. Fed. R. Evid. 403.

Accordingly, defendants' motion for a new trial is denied.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOSEPH PASKVAN,	) CASE NO. 89CV2276
Plaintiff,	) Judge John M. Manos
v.	)
CITY OF CLEVELAND CIVIL SERVICE COMMISSION, et al.,	) ORDER
Defendants.	) (Filed May 13, 1994)

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, defendants' Motion for Judgment as a Matter of Law, or in the Alternative, New Trial is denied.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

JOSEPH PASKVAN V.	**JUDGMENT IN A CIVIL CASE**
CITY OF CLEVELAND CIVIL SERVICE COMMISSION, et al.	CASE NUMBER: 1:89CV2276 (Filed Mar. 10, 1994)

X **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is hereby entered in favor of the plaintiff and against the defendants on the claim of violation of equal protection under the law.

Damages are hereby awarded to the plaintiff in the amount of $50,000.00.

Damages for loss of reputation and mental pain and suffering are hereby awarded to the plaintiff in the amount of $150,000.00.

March 10, 1994
Date

GERI M. SMITH
Clerk

/s/ Christine M. Huth
(By) Deputy Clerk
Christine M. Huth

UNITED STATES CONSTITUTION

AMENDMENT XIV – CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> * * *

---

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Supreme Court, U.S.
FILED
MAR 22 1996
CLERK

No. 95-1320

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

MITCHELL BROWN,

Petitioner,

V.

JOSEPH PASKVAN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Edward G. Kramer #0024873
Counsel of Record
Kenneth J. Kowalski #0024878
Timothy R. Obringer #0055999
KRAMER & NIERMANN, L.P.A.
3214 Prospect Ave., East
Cleveland, Ohio 44115-2600
(216) 431-5300

Attorneys for Respondent - Joseph Paskvan

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

23pp

QUESTION RESTATED FOR REVIEW

May a finding of race-based denial of equal protection in the workplace be premised upon evidence that a police officer was arbitrarily denied a promotion under circumstances that suggest that he was singled out for special treatment, that the decision was admittedly influenced by racially motivated protests of community groups and by political pressure from a city councilman responding to such pressures, when the non-discriminatory reasons proffered by the decision makers were clearly pretextual?

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No. 95-1320

In The

Supreme Court of the United States

October Term, 1995

MITCHELL J. BROWN AND
HOWARD E. RUDOLPH,

Petitioners,

vs.

JOSEPH PASKVAN,

Respondent.

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On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Sixth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

-----◆-----

Edward G. Kramer #0024873
Kenneth J. Kowalski #0024878
Timothy R. Obringer #0055999
Kramer & Niermann, L.P.A.
3214 Prospect Ave., East
Cleveland, Ohio 44115-2600

Attorneys for Respondent
Joseph Paskvan

Respondent, Joseph Paskvan, respectfully requests that this Court deny the petition for writ of certiorari which seeks review of the Sixth Circuit's opinion below. That opinion is reprinted in the petition of certiorari at Appendix A-1. The petition should be denied since the Sixth Circuit's opinion does not conflict with the decisions of this Court or another United States Court of Appeals. Rather, the petition asserts that the jury and Court of Appeals erroneously applied the facts in arriving at their decisions.

STATEMENT OF THE CASE

Respondent, Joseph Paskvan has been a City of Cleveland Police Officer since 1973. He has been involved in nine shootings in the line of duty. Because he was stationed in areas of the city largely populated by minorities, all nine shootings involved minorities. The Respondent was found to be legally justified in each of the nine shootings and no criminal charges or even department disciplinary proceedings were brought against him with respect to any of the shootings. Further, Officer Paskvan was found to have complied with all departmental rules under the Manual of Rules and Regulations for the Conduct and Discipline of Officers and Employees of the Division of Police, Chapter 10 - Use of Deadly Force, dealing with judgment.

Officer Paskvan took and passed a written promotional examination for the position of sergeant in June, 1987. He was certified as eligible

for promotion to sergeant and was placed third on an eligibility list as a result of his score on the exam.

At trial, Officer Paskvan showed that it was the normal practice of the City of Cleveland to promote officers by rank order based on the results of civil service tests. Reviewing the last two certified eligibility list for the Position of Sergeant of Police in 1982 and 1985, it was shown that all police officers who were both physically able and willing to become sergeants were in fact promoted in rank order.

The City promoted candidates 1 through 50 on the 1987 eligible list, except for Officer Paskvan. Since it was highly unusual for the City not to promote using rank order on the list, this fact made the Petitioner's decision suspect.

At the time the City decided not to promote Officer Paskvan, a number of black city councilmen, including John Barnes, who was the Chairman of the Public Safety Committee of Cleveland City Council, were urging the Petitioners to remove him from his present duties. Councilman Barnes wrote a letter to Chief Rudolph, indicating that various community organizations had targeted Officer Paskvan because of his history of altercations with minorities. Councilman Barnes identified several of the organizations which protested against Officer Paskvan, such as the NAACP, as primarily minority. Councilman Barnes received petitions from these minority organizations demanding the removal of

Officer Paskvan from the police force and presented them to Petitioner Rudolph. Finally, Councilman Barnes discussed his concern about the possible repercussions of Officer Paskvan being promoted to sergeant with Safety Director Brown.

The denial of Officer Paskvan's promotion to sergeant was merely part of a continuing effort by the Petitioners to unlawfully punish him to obtain political support from the black community. For instance, the City relegated him to permanent duty in the gymnasium, an assignment which Officer Paskvan eventually challenged. An arbitration order ruled that the assignment was "arbitrary, discriminatory or unreasonable" and ordered the City to transfer Officer Paskvan out of the gym. Officer Paskvan was also deprived of secondary employment rights by order of Petitioner Rudolph, despite the fact that approval of such employment was recommended by Officer Paskvan's district or bureau commanders. Officer Paskvan again challenged this policy by arbitration and again the City's treatment of Officer Paskvan was held to be arbitrary and discriminatory.

Other police officers were shown to have been involved in shootings, but unlike Officer Paskvan, they were not singled out for arbitrary and discriminatory treatment. Officer Robert Tolliver, a black officer for the Cleveland Police Department, testified that he has been involved in two shootings of minority citizens, including one fatal shooting. Officer Tolliver was promoted to sergeant, after the

two shootings. Also testifying was Lieutenant Gary Gingell, a white officer of the Cleveland Police Department, who testified that he was involved in the shooting of a white male and was promoted to sergeant after the shooting.[1]

Of course, neither of these officers was a white officer involved in the shooting of minority citizens. Councilman Barnes testified that he did not write a letter to Petitioner Rudolph, the Chief of Police, demanding the termination of the black officer who had been involved in shootings in the line of duty.

Under the City of Cleveland's Charter the ultimate decision-maker about promotions of police officers is the Safety Director. Petitioner Mitchell Brown testified that he decided not to promote

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[1] The Petitioners argue that neither of these individuals are comparable since Officer Paskvan had been involved in more shootings. In spite of the number of shootings Officer Paskvan was involved in, Petitioner Rudolph testified that he would have recommended Officer Paskvan for promotion, except for his involvement with the last shooting. Petitioner Rudolph could not explain why this last shooting was so different as to change his mind about promoting Officer Paskvan except for his statement that Officer Paskvan had exercised poor judgment in shooting the suspect. Thus, Officers Tolliver and Gingell's situations are applicable to this case.

Officer Paskvan based on the recommendation of Petitioner Rudolph and because of community pressure.

Petitioner Rudolph testified that factors looked at when considering an officer for promotion included excessive sick time and discipline. Rudolph testified that Paskvan had no excessive sick time, had no disciplinary action to deny him a promotion for sergeant, had done nothing illegal, had no physical problems that would prevent him from being promoted to sergeant, and there was no budgetary reason to prevent Officer Paskvan's promotion.

At trial, Petitioner Rudolph maintained that he recommended that Petitioner Brown not promote Officer Paskvan because he exercised poor judgment in his last two shootings. However, the evidence was more than sufficient to permit a determination by the jury that this reason was pretextual. Petitioner Rudolph, while a lieutenant in charge of the Cleveland Police Department's homicide unit, had conducted the investigation of Officer Paskvan's last two shootings. Rudolph's investigation of both of these shootings determined that Officer Paskvan's actions had not violated any criminal laws. Petitioner Rudolph also testified that Officer Paskvan had been found to have complied with the Police Departments Rules and Regulations in the "use of Deadly Force." Petitioner Rudolph's investigation had found that Officer Paskvan had exercised proper judgment in the use of deadly

force. Further under the Police Department Rules and regulations "if an officer is determined to have used poor judgment by a superior officer, that superior officer shall discipline the officer who has exercised poor judgment." Petitioner Rudolph admitted that he had not recommended any discipline of Officer Paskvan for these shootings. Petitioner Rudolph confirmed that he and Safety Director Brown were influenced by the community outcry when deciding not to promote Officer Paskvan.

Another pretextual reason offered by Petitioner Rudolph for not appointing Officer Paskvan to a sergeant's position in a desk job, was that Paskvan would have been supervising other officers in that capacity and that Paskvan was unfit for supervisory duties. However, that alleged motive was called into question by the testimony elicited from Officer George Isherwood, a sergeant for the Cleveland Police Department and the current supervisor of Officer Paskvan. Isherwood testified that as supervisor, he has observed that Officer Paskvan has good judgment. Isherwood has placed Officer Paskvan in charge of the unit's eight other police officers on his days off, and Officer Paskvan had performed Isherwood's duties well.

REASONS TO DENY THE WRIT

I. The Sixth Circuit Correctly Held That The Evidence Presented Was Sufficient to Support the Jury Verdict On Behalf of Officer Paskvan.

Officer Paskvan alleged that the City applied its promotional policy to him in a discriminatory manner in that he was denied promotion for racially discriminatory reasons. Once proven, this allegation clearly entitled Officer Paskvan to judgment, since the discriminatory application of a law or policy that on its face is unobjectionable, such as the City's promotional scheme, can be challenged as a denial of equal protection. Charles v. Baesler, 910 F. 2d 1349, 1356 (6th Cir. 1990), citing, Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886). (In order to establish an equal protection violation, Plaintiff must show that defendants administered the promotional system with a discriminatory intent or purpose.) See also, Ciechon v. City of Chicago, 686 F.2d 511, 522 (7th Cir. 1982)("Equal protection demands at a minimum that a municipality must apply its laws in a rational and nonarbitrary way.")

The Petitioners' assert that Officer Paskvan failed to prove his claim of race discrimination. However, a review of the evidence presented at trial shows that there was ample evidence from which the jury could reach its conclusion that the City applied its promotional scheme to him with

discriminatory intent or purpose. Wesley v. Collins, 791 F. 2d 1255, 1262 (6th Cir. 1986).

The evidence showed that the plaintiff's performance evaluations, over 19 years of service, rated him as an excellent police officer. Since it was highly unusual for the City not to promote using rank order on the list, this fact makes the City's decision suspect. Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 266, 267-68, 97 S. Ct. 555, 564-65 (1977) Moreover, the evidence showed the racial controversy surrounding Plaintiff's position on the force. In fact, the Petitioners testified that the public outcry and the media attention did play a role in their decision not to promote. This is direct evidence of discriminatory intent or purpose, and shows that they did not apply their procedures in a "rational and non-arbitrary way." Ciechon v. City of Chicago, supra at 522.[2]

Officer Paskvan presented evidence that the denial of his promotion to sergeant was part of a continuing effort by the City to unlawfully punish

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[2] It is perplexing that Petitioners continue to object to Officer Paskvan's citing Ciechon v., City of Chicago, supra. The Petitioners' argument is flawed since the Seventh Circuit in Ciechon did hold that an equal protection violation had been made out. Ciechon, 686 F. 2d at 522-524.

him to obtain political support from the black community. As stated above, this effort included relegating Officer Paskvan to permanent duty in the police gymnasium and denying him secondary employment approval, which was routinely granted, and was heavily relied upon by the officers for supplemental income.

Both former Police Chief Rudolph and Safety Director Brown admitted that part of their decision was based on the publicity and public demonstrations by minorities and minority organizations. "The jury could reasonably infer that Rudolph and Brown refused to promote Paskvan, in part, because he is white" based on this evidence. Paskvan v. City of Cleveland Civil Service Commission et al. Case No. 94-3593 (6th Cir. November 21, 1995) opinion reprinted in the petition of certiorari at Appendix A-11.

The Petitioners' admitted that at least part of their decision was based upon an impermissible reason, and the jury found that the other reasons offered by them for their punishment of Officer Paskvan, - including the reason offered for the first time at trial, i.e., his alleged poor judgment - were not credible.

Since the Petitioners admitted their discriminatory motive, and the other reasons proffered were simply not credible, all other

reasons, legitimate or otherwise, do not matter. TWA v. Thurston, 469 U.S. 111; 105 S.Ct. 613 (1985).

The testimony of the police officers called who had been involved in shootings but were promoted established that the denial of promotion to Officer Paskvan was for racial reasons. Sergeant Tolliver, a black officer, testified that he was forced to shoot minority suspects, yet he suffered no consequences as a result of his appropriate actions. However, Officer Paskvan, a white officer who shot minorities, suffered severe consequences as a result of his appropriate actions. The testimony by Sergeant Tolliver established that if Officer Paskvan had been black, he would have been promoted to sergeant in 1988.

Additionally, the testimony of former City Councilman and Chairman of the Public Safety Committee, John Barnes, and Defendants Rudolph's and Brown's admission that they listened to him, further shows the intentional nature of the discrimination.

The City's basic premise appears to be that the District Court Judge, the jury and the Court of Appeals were all misled into believing that Officer Paskvan's evidence that he was treated in an unprecedented arbitrary fashion meant that he had necessarily made out his equal protection claim. However, it is clear from the opinions below, reprinted with the Petition, that both the trial and

appellate courts understood and applied the correct standard in evaluating Officer Paskvan's equal protection claim and the jury was correctly instructed as to how to evaluate the evidence supporting that claim.

The City fails to either understand or acknowledge that the evidence of arbitrary treatment, while perhaps not sufficient to establish a due process claim, is still evidence that supports the equal protection claim. Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. at 267-68. In this case that evidence, along with the evidence that the decision-makers bowed to racially motivated political pressure, was certainly sufficient to support the jury's verdict, especially in light of the fact that the City offered as alternative motives for their treatment of Officer Paskvan only transparently pretextual reasons. As held by this Court in Hicks v. St. Mary's Honor Center 509 U.S. 502, 113 S.Ct. 2742 (1993), a case the City curiously fails to mention, a finding that an employer has offered false reasons for an employment decision, while not necessarily entitling a plaintiff to judgment, is certainly a factor that would support a further finding that the real motive was discriminatory.

II. Officer Paskvan Was Not Required To Prove Similarly Situated Minority Police Officers Were Treated Differently by the Petitioners To Establish His Equal Protection Claim.

The Petitioners argue that to make out his equal protection claim, Officer Paskvan was required to prove that similarly situated minority officers on his eligibility list were promoted. The Petitioners, however, have overstated the nature of the specificity of the proof of comparability required for an equal protection claim. When assessed correctly, it is clear that the evidence shows that similarly situated minorities were promoted.

First, however, since Officer Paskvan put on direct evidence of discriminatory motive, intent or purpose, through the testimony of the Petitioners Rudolph and Brown, he has established sufficient evidence to sustain his claim under the equal protection clause, and need go no further with respect to prima facie requirements. TWA v. Thurston, 469 U.S. 111; 105 S.Ct. 613 (1985). The jury could have found against the City on the basis of the evidence that racial considerations were a reason for the denial of promotion alone without even looking for other officers who got promotions. TWA v. Thurston, 469 U.S. 111; 105 S.Ct. 613 (1985); McDonald v. Santa Fe Trail, 427 U.S. 273, 282 n. 10. (1976). See also, Ciechon v. City of Chicago, 686 F.2d 511, 522 (7th Cir. 1982).

While Title VII case law can be applied to this type of action, in this case, the analytical framework set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, (1981), on which the Petitioners hang their argument, is not applicable. Trans World Airlines, Inc. v. Thurston, 469 U.S. 117, 121, 105 S. Ct. 613, (1985) [The McDonnell-Douglas test is inapplicable when the Plaintiff presents direct evidence of discrimination.]

Further, the McDonnell-Douglas formulation is only one way to prove a prima facie case of discrimination. Ramirez v. Sloss, 615 F. 2d 163, 168 (5th Cir. 1980). As stated in that case: "[C]ourts must not allow the mechanical formula to blind them to the real issue of whether the defendant illegally discriminated against the plaintiff." Id. As held by this Court in Hicks, 509 U.S. at 513, 113 S.Ct. at 2751 the McDonnell-Douglas framework is only a procedural device utilized for proving a case of discrimination in the absence of direct evidence. There is no requirement that mandates that framework be used in every case.

There is nothing magical about the McDonnell-Douglas prima facie test. Many times courts have used different methods to prove whether discrimination had occurred. A prima facie case, whether under the equal protection clause of the Fourteenth Amendment or any federal antidiscrimination statute, requires proof of a state

of facts that makes it more likely than not that there has been discrimination. Cooper v. Federal Reserve Bank of Richmond, 104 S. Ct. 2794, 2799 (1984) It was this standard of proof which the Court instructed the jury to follow in the instant case.

The City can cite no case to indicate that the courts are to slavishly apply the McDonnell-Douglas formula in every case in which racial discrimination by an employer is alleged. Nor does the City point out any decision of this Court or of another circuit that is in conflict with the decision of the Sixth Circuit below.[3]

Discriminatory purpose can be shown either by direct or indirect proof of discriminatory intent. In absence of direct proof, "discriminatory motive...can in some situations be inferred from the mere fact of differences of treatment," International Brotherhood of Teamsters v. United States, 431 U.S. 333, 335, 97 S.Ct. 1843,1854 n.15 (1977). Or the plaintiff can use the seven factors outlined by

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[3] The City points only to the Sixth Circuit decision of Mitchell v. Toledo Hospital, 964 F. 2d 577 (6th Cir. 1992), in arguing that the Court of Appeals in this case did not apply the proper burden in assessing whether Officer Paskvan had sufficiently proven dissimilar treatment. (Petition, p. 14.) The City does not explain why this Court should accept this case to instruct the Sixth Circuit on this alleged internal inconsistency.

Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 266, 267-68, 97 S. Ct. 555, 564-65 (1977) to establish evidence of racially discriminatory purpose. The factors are: (1) adverse racial impact; (2) historical background, (3) specific sequence of events leading up to the decision, (4) departure from normal procedure sequence, (5) substantive departure from routine decision, (6) contemporary statements made by decision-makers, and (7) the inevitability of the consequence of the conduct. Ibid.

For the sake of argument, even if Officer Paskvan was required to offer evidence of background circumstances which would support the conclusion that the Petitioners were discriminating against a white individual, that burden was clearly met. The evidence of the unusual circumstances surrounding Officer Paskvan's denial of promotion, including the lack of any justifiable reason in his record, the failure of the City to articulate any credible reason, the intense political pressure by the black city councilmen and minority organizations on the Petitioners that played a part in the treatment of him, is more than enough to raise suspicions as to the motivation in denying him his promotion. As stated in Parker v. Baltimore & Ohio Railroad Co., 652 F.2d 1012, 1017 (D. C. Cir. 1981), practices inconsistent with the usual procedure governing promotions can establish a prima facie case of race discrimination.

Therefore, Officer Paskvan, has shown through direct and circumstantial evidence that the Petitioners acted with a discriminatory motive or purpose, need not avail himself of the McDonnell-Douglas "similarly situated person" framework. The inquiry at this stage of the case became whether the Petitioners had a discriminatory motive in denying Officer Paskvan a promotion. U.S. Postal Service Board of Governors v. Aikens, 460 U.S 711, 103 S. Ct. 1478 (1983). Because there was sufficient evidence presented from which the jury could find that Officer Paskvan was treated differently on the basis of race, the judgment that the City of Cleveland denied Officer Joe Paskvan his right to equal protection under the law should not be reversed.

III. Conclusion.

The petition for certiorari should be denied.

Respectfully submitted,

EDWARD G. KRAMER (0024873)
KENNETH J. KOWALSKI (0024878)
TIMOTHY R. OBRINGER (0055999)
Kramer & Niermann, L. P. A.
3214 Prospect Avenue, East
Cleveland, Ohio 44115-2600
(216) 431-5300

ATTORNEYS FOR RESPONDENT

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No. 95-1320

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MITCHELL J. BROWN AND
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vs.

JOSEPH PASKVAN,

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF OF PETITIONERS

SHARON SOBOL JORDAN
Director of Law

ROBERT JOSEPH LALLY
Counsel of Record

City of Cleveland
Room 106 – City Hall
601 Lakeside Avenue
Cleveland, Ohio 44114
(216) 664-2800

Attorneys for Petitioners
Mitchell J. Brown and
Howard E. Rudolph

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ARGUMENT

According to the Respondent Paskvan's statement of the case, the Petitioners' decision not to promote him to the rank of sergeant was "suspect" because Petitioners promoted candidates numbers one through fifty on Paskvan's eligible list except for Paskvan and it was unusual for promotions not to be made according to rank. However, Paskvan has failed to create any issue regarding the race of those promoted at the time he was not granted the discretionary promotion. Instead, Paskvan argues that the race of peripheral persons, including minority persons, who protested against his conduct, are a legitimate basis for his claim of race discrimination. Thus, Paskvan concedes that no minority persons promoted from Paskvan's eligible list were less qualified than Paskvan.

Paskvan essentially concedes that he has not presented proof of a similarly situated minority officer, and in fact maintains that no such proof was required.[1] The linchpin of Paskvan's argument is that the Petitioners' consideration of minority citizen protests in making the

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[1] While Paskvan preliminarily argues that Officers Tolliver and Gingell are similarly situated, it is undisputed that neither of these officers was on Paskvan's eligible list and neither was promoted in Paskvan's place. Further, Paskvan was involved in nine shootings whereas Tolliver was involved in two shootings and Gingell was involved in one shooting. Moreover, the fact that Paskvan relies on one white officer, Gingell, and one black officer, Tolliver, as his "comparables" reveals that Paskvan is not relying on a similarly situated minority co-worker to state his claim, but on the race of peripheral persons. In fact, the second pillar of Paskvan's argument is that Paskvan was not required to prove that similarly situated minority police officers were treated differently than Paskvan.

discretionary decision not to promote Paskvan constituted evidence of race discrimination. Paskvan's case must stand or fall based on the viability of that theory, and Paskvan has not presented any authorities which support that theory.

As expected, Paskvan relies on *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982). However, Paskvan fails to address Petitioners' argument that the Seventh Circuit Court's holding in *Ciechon* was that the plaintiff's due process rights were implicated when the defendant city reacted to the threat of adverse publicity by misusing its disciplinary procedures against the plaintiff. In this case, Petitioners prevailed at trial on Paskvan's due process claim.

Paskvan is content to note that a *prima facie* case of denial of equal protection was also stated in *Ciechon* without further explanation. However, the basis of the equal protection violation noted in *Ciechon* was that there was invidious discrimination against the plaintiff on the basis of sex because she was treated differently than a similarly situated male paramedic when she was disciplined. Paskvan concedes that he has not produced a similarly situated minority officer, and therefore Paskvan has failed to state a *prima facie* case of denial of equal protection based on race according to the rule of law stated in *Ciechon*.

Although Paskvan argues that there is direct evidence of race discrimination according to *Ciechon* because minority citizen complaints influenced the Petitioners' decision not to promote him, that is certainly not the holding of *Ciechon*. In this case, the Petitioners did not

discipline Paskvan, but rather exercised official discretion in not granting Paskvan a promotion. Paskvan has no legitimate claim for denial of due process rights based on *Ciechon* because the Petitioners never misused disciplinary procedures against Paskvan, as noted in his brief in opposition. Further, Paskvan has no legitimate claim for denial of equal protection rights based on *Ciechon* because he has not shown that the Petitioners treated him differently than a similarly situated minority candidate for sergeant. Simply put, *Ciechon* presents the most analogous set of facts of all cases cited by Paskvan, and Paskvan fails to state a *prima facie* case within the meaning of *Ciechon*.

While Paskvan claims that he has presented direct evidence of race discrimination, his reliance on *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 266 (1977), and *Hicks v. St. Mary's Honor Center*, 509 U.S. 502 (1993), indicates that Paskvan's case is circumstantial at best. Paskvan misreads *Hicks*, in which this Court held that a fact finder's rejection of the employer's proffered reason for an employment decision does not entitle the plaintiff to judgment. Paskvan's reliance upon *Arlington Heights* is a ploy to elevate the importance of circumstances surrounding the decision not to promote Paskvan, especially the race of certain citizens opposing his promotion, above the more immediate and essential determination of whether a less qualified minority candidate for promotion to sergeant was promoted instead of Paskvan. Paskvan's reliance upon *Hicks* and *Arlington Heights* is merely an "end around" in denigration of the well established paradigm of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which provides that, absent

direct evidence of race discrimination, Paskvan must establish a *prima facie* case of race discrimination including proof that similarly situated minority candidates for sergeant were treated differently than Paskvan.

Finally, Paskvan's alleged indirect evidence of race discrimination does not pass muster according to the factors outlined in *Arlington Heights* for the same reasons that his alleged direct evidence does not pass muster. Whether the evidence of the influence of minority citizen complaints on the Petitioners' discretionary decision not to promote Paskvan is semantically described as direct evidence or circumstantial evidence, this ultimate evidence on which Paskvan's case must stand or fall is legally insufficient to establish a claim for denial of equal protection based on race.

CONCLUSION

Based on the foregoing, it is respectfully requested that a Writ of Certiorari should be granted.

Respectfully submitted,

SHARON SOBOL JORDAN
Director of Law

ROBERT JOSEPH LALLY
Assistant Director of Law
Counsel of Record

City of Cleveland
Room 106 – City Hall
601 Lakeside Avenue
Cleveland, Ohio 44114
(216) 664-2800

Attorneys for Petitioners
Mitchell J. Brown and
Howard E. Rudolph